

**United States Department of Labor
Employees' Compensation Appeals Board**

E.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Houston, TX, Employer**

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**Docket No. 17-1229
Issued: December 13, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 15, 2017 appellant filed a timely appeal from a November 14, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days elapsed from OWCP's last relevant merit decision, dated June 27, 2013, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹ As the 180th day for filing the appeal fell on a weekend (Saturday, May 13, 2017), appellant had until the close of the next business day (Monday, May 15, 2017) to timely file his appeal. *See* 20 C.F.R. § 501.3(f)(2). The Clerk of the Appellate Boards received the current appeal on May 15, 2017 and, therefore, it is timely filed. *Id.*

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 10, 1999 appellant, then a 32-year-old mail handler technician, injured his lower back moving a heavy box of mail at work. OWCP initially accepted his traumatic injury claim (Form CA-1) for lumbar sprain. It later expanded the claim to include lumbar intervertebral disc displacement and lumbosacral neuritis. Appellant received compensation for intermittent wage loss, as well as for periods of temporary total disability. OWCP also granted a schedule award for six percent permanent impairment of his left lower extremity. Appellant last worked for the employing establishment on or about April 15, 2010.³ OWCP paid wage-loss compensation for temporary total disability beginning April 16, 2010 and subsequently placed him on the periodic compensation rolls.

Appellant received periodic medical treatment from an attending Board-certified orthopedic surgeon, Dr. Howard B. Cotler. In a March 29, 2011 report, Dr. Cotler diagnosed “workers’ compensation upper and lower back injury” and chronic narcotics and muscle relaxer usage, and indicated that appellant did not appear to be disabled from work.

In March 2012, OWCP referred appellant for a second opinion examination by Dr. James E. Butler, III, a Board-certified orthopedic surgeon. It requested that Dr. Butler evaluate whether appellant continued to have residuals of his April 10, 1999 work injury and whether he could work in any capacity.

In a March 26, 2012 report, Dr. Butler discussed appellant’s factual and medical history and reported the findings of the physical examination he conducted on that date. He diagnosed degenerative disc disease at C4-5, C5-6, C6-7, L3-4, L4-5, and L5-S1 and found that appellant’s back condition prevented him from performing his regular work as a mail handler. However, Dr. Butler opined that appellant could work for eight hours per day subject to specific restrictions which he outlined in a March 26, 2012 Work Capacity Evaluation form (Form OWCP-5c).

In June 2012, appellant began participating in an OWCP-sponsored vocational rehabilitation program, but ultimately he did not return to work.⁴

On January 7, 2013 Dr. Butler indicated that, since he had examined appellant on March 26, 2012, he had reviewed surveillance video which showed appellant walking briskly and bending over on several occasions without any limitations, difficulties, or residual problems.⁵ He noted that, based on the new information, it was his opinion that appellant could

³ As of April 15, 2010, the employing establishment was either unable or unwilling to accommodate appellant’s then-current work restrictions.

⁴ Effective December 7, 2012, the employing establishment terminated appellant’s services because he was unable to perform the essential functions of his position.

⁵ Several investigative reports of the Office of Inspector General (OIG) for the employing establishment were added to the record in 2011 and 2013. The reports detailed observations made by OIG investigators of appellant’s activities at his home and while running errands between late 2010 and early 2013. The investigators observed appellant engaging in such activities as carrying boxes and buckets and sweeping garbage at his home without apparent difficulty. An OWCP telephone conversation record shows that an OIG agent called an OWCP claims examiner on January 9, 2013 and advised that he had shown Dr. Butler an investigative tape regarding appellant’s activities.

accomplish more than was previously believed and that he could return to work without restriction.

In February 2013, OWCP referred appellant for a second opinion examination to Dr. Ivan J. Antosh, a Board-certified orthopedic surgeon. It asked Dr. Antosh to determine whether appellant continued to have residuals of his April 10, 1999 work injury and to comment on his ability to work.

In a March 15, 2013 report, Dr. Antosh detailed appellant's factual and medical history and reported the findings of the physical examination he carried out on that date. He indicated that, upon physical examination, appellant had normal sensation in his lower extremities, and 5/5 strength in the muscle groups of his lower extremities. Straight leg raise testing was negative on a bilateral basis. Dr. Antosh found that lumbar motion was within limits except for mild limitation in lateral rotation. He determined that, given the benign physical examination, he had concluded that appellant ceased to have residuals of his April 10, 1999 employment injury. Dr. Antosh determined that appellant did not have any activity limitations. He did not believe that appellant needed further treatment and indicated that he could be released to full-duty work immediately.

OWCP requested that appellant's physician, Dr. Colter, review Dr. Antosh's March 15, 2013 report and provided him with a form asking Dr. Colter whether he agreed with Dr. Antosh's findings. On April 8, 2013 Dr. Colter signed and dated the portion of the form indicating that he agreed with Dr. Antosh's March 15, 2013 findings.

In a May 7, 2013 letter, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits because he ceased to have residuals of his April 10, 1999 employment injury. It indicated that the proposed termination action was based on the March 15, 2013 report of Dr. Antosh and the April 8, 2013 report of Dr. Colter.

In a June 27, 2013 decision, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits effective June 30, 2013.

On September 6, 2016 appellant requested reconsideration of the June 27, 2013 decision. He argued that, between 2010 and 2013, the OIG for the employing establishment carried out an investigation of him which he believed constituted retaliation for his September 2009 filing of an Equal Employment Opportunity (EEO) claim/complaint against management for discrimination, harassment, and improper contact with his attending physician. Appellant discussed occasions when OIG agents had contact with OWCP officials, including an instance in January 2013 when an OIG agent spoke to an OWCP claims examiner regarding an investigative tape reviewed by Dr. Butler, and argued that these contacts prejudiced OWCP's obtaining of evidence regarding his medical condition and ability to work. He discussed Board cases in which it was found that contacts by OIG officials impermissibly prejudiced the perceptions of claimants by examining physicians. Appellant asserted that an attached August 8, 2014 Initial Decision of the Merit Systems Protection Board (MSPB) showed clear evidence of error in OWCP's June 27, 2013 decision. He indicated that the MSPB decision contained a finding that Dr. Antosh's March 15, 2013 report was of limited probative value with respect to its finding that he could return to regular duty and, therefore, this report could not serve as a basis for terminating his wage-loss compensation and medical benefits effective June 30, 2013.

In its August 8, 2014 Initial Decision, the Dallas Regional Office of the MSPB considered appellant's appeal of the employing establishment's November 26, 2012 Letter of Decision removing him from employment on December 7, 2012 due to his failure to perform the essential functions of his position.⁶ It found that the employing establishment was justified in taking this action because the evidence showed that he could not perform the essential functions of his position. The MSPB evaluated Dr. Antosh's March 15, 2013 report and found it to be "of limited probative weight" with respect to its finding that appellant could return to full-time work without restrictions.

Appellant submitted other documents, including a copy of OWCP's June 27, 2013 decision, a statement he sent to a Congressional representative, a May 15, 2012 e-mail from an employing establishment official concerning a search for suitable work, a July 10, 2013 document concerning health benefits enrollment, the record of a June 15, 2010 conversation between an employing establishment official and an OWCP official regarding the content of various Duty Status Reports (Form CA-17) from 2009 and 2010, and a January 25, 2010 Form CA-17 in which an attending physician recommended work restrictions. He also submitted a record of a March 5, 2012 telephone conversation between an OIG investigator, and an OWCP official regarding the possibility of arranging an impartial medical examination.⁷

In a November 14, 2016 decision, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It noted that the September 6, 2016 request for reconsideration was received more than one year after the issuance of the June 27, 2013 decision. OWCP also found that the evidence and argument appellant submitted in connection with his untimely reconsideration request did not demonstrate clear error in its June 27, 2013 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary, in accordance with the facts found on review, may end, decrease or increase the compensation awarded; or award compensation previously refused or discontinued.⁸

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within

⁶ Appellant submitted a November 26, 2012 Letter of Decision in which the employing establishment advised that a review of evidence showed that its issuance of a November 7, 2012 Notice of Proposed Separation was justified and that he would be removed from the employing establishment on December 7, 2012 due to his failure to perform the essential functions of his position. The decision noted that he had not worked as a mail processing clerk since April 16, 2010.

⁷ Appellant resubmitted the record of a January 9, 2013 telephone conversation between an OIG agent and an OWCP claims examiner.

⁸ 5 U.S.C. § 8128(a).

one year of the date of OWCP's decision for which review is sought.⁹ However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.¹⁰

The evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹¹ The Board notes that clear evidence of error is intended to represent a difficult standard.¹² Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹³ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹⁴ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁵ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁶

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁷ As appellant's request for reconsideration was not received by OWCP until September 6, 2016, more than one year after issuance of its June 27, 2013 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in its June 27, 2013 decision.¹⁸

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹¹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹² *R.K.*, Docket No. 16-0355 (issued June 27, 2016).

¹³ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁷ *See supra* note 9.

¹⁸ *See supra* note 10. In its June 27, 2013 decision, OWCP terminated appellant's wage-loss compensation and medical benefits, effective June 30, 2013, finding that he had no residuals of his April 10, 1999 work injury after that date. It based the termination action on the March 15, 2013 report of Dr. Antosh, an OWCP referral physician, and the April 8, 2013 report of Dr. Cotler, an attending physician.

Appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its June 27, 2013 decision.

Appellant failed to submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its June 27, 2013 decision.¹⁹ His contentions mostly made reference to evidence previously of record and already considered. The evidence and argument appellant submitted did not raise a substantial question concerning the correctness of OWCP's decision.²⁰ He noted that, between 2010 and 2013, the OIG for the employing establishment carried out an investigation of his activities and that OIG agents had contact with OWCP officials, including an instance in January 2013 when an OIG agent spoke to an OWCP claims examiner and advised that he had shown Dr. Butler an investigative tape regarding appellant's activities. Appellant argued that these contacts prejudiced OWCP's obtaining of evidence regarding his medical condition and ability to work. The Board notes that this argument does not demonstrate clear evidence of error by OWCP in its June 27, 2013 termination decision. The termination of appellant's compensation was based on the opinions of Dr. Antosh and Dr. Colter and appellant has not demonstrated any error in the development of the medical evidence associated with those findings.

Appellant also argued that an attached August 8, 2014 Initial Decision of the MSPB showed clear evidence of error in OWCP's June 27, 2013 decision. In its decision, the MSPB considered his appeal of the employing establishment's removal of him from employment on December 7, 2012 due to his failure to perform the essential functions of his position.²¹ It found that the employing establishment was justified in taking this action because the evidence showed that appellant could not perform the essential functions of his position. The MSPB evaluated Dr. Antosh's March 15, 2013 report and found it to be "of limited probative weight" with respect to its finding that he could return to full-time work without restrictions. However, appellant's highlighting of this aspect of its decision does not show clear evidence of error in OWCP's June 27, 2013 decision because the Board has long held that determinations by other federal agencies do not establish entitlement to benefits under FECA.²²

Appellant submitted other documents, including a copy of OWCP's June 27, 2013 decision, a statement he sent to a Congressional representative, a May 15, 2012 e-mail from an employing establishment official concerning a search for suitable work, a July 10, 2013 document concerning health benefits enrollment, and the record of a June 15, 2010 conversation between an employing establishment official and an OWCP official regarding the contents of CA-17 forms from 2009 and 2010. He also submitted records of March 5, 2012 and January 9, 2013 telephone conversations between OIG investigators and OWCP officials.

¹⁹ See *supra* note 10.

²⁰ See *supra* note 13.

²¹ Appellant submitted a November 26, 2012 Letter of Decision in which the employing establishment advised that a review of evidence showed that its issuance of a November 7, 2012 Notice of Proposed Separation was justified and that he would be removed from the employing establishment on December 7, 2012 due to his failure to perform the essential functions of his position.

²² See *Donald Johnson*, 44 ECAB 540, 551 (1993).

However, the submission of this evidence would not raise a substantial question as to the correctness of OWCP's June 27, 2013 decision. The main issue of this case is essentially medical in nature, *i.e.*, whether OWCP presented sufficient medical evidence to justify termination of appellant's compensation and medical benefits. This nonmedical evidence would not tend to demonstrate clear evidence of error in the medical determination OWCP made in its June 27, 2013 decision.²³

The Board finds that appellant's application for review does not show on its face that OWCP committed error in its June 27, 2013 decision, which terminated his wage-loss compensation and medical benefits, effective June 30, 2013.²⁴ As noted, clear evidence of error is intended to represent a difficult standard.²⁵

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's June 27, 2013 decision and OWCP properly determined that he did not show clear evidence of error in that decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

²³ The March 5, 2012 and January 9, 2013 telephone conversations between OIG investigators and OWCP officials do not bear any relation to the opinions of Dr. Antosh and Dr. Colter upon which OWCP relied for its termination action. Appellant also submitted a January 25, 2010 Form CA-17 in which an attending physician recommended work restrictions. However, this report was produced well before the 2013 reports of Dr. Antosh and Dr. Colter and is not relevant to the assessment of the medical evidence in 2013.

²⁴ See *S.F.*, Docket No. 09-0270 (issued August 26, 2009).

²⁵ See *supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the November 14, 2016 decision of the Office of Workers' Compensation Programs is affirmed.²⁶

Issued: December 13, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

²⁶ Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.